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Davies, Julien Tappan

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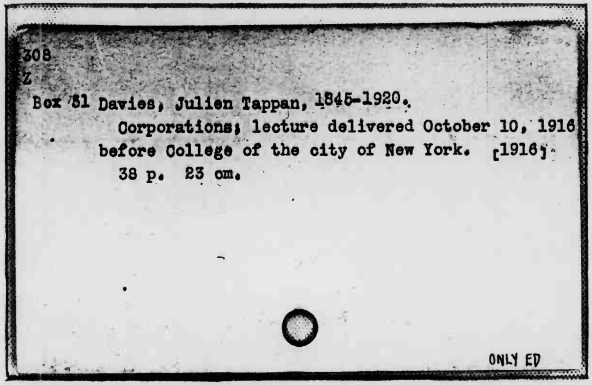
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Dr. Nicholas Murray Butler
With the regards of
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CORPORATIONS

LECTURE

DELIVERED OCTOBER 10, 1916

BEFORE

COLLEGE OF THE CITY OF NEW YORK

BY

JULIEN TAPPAN DAVIES

CORPORATIONS

Lecture Delivered October 10, 1916, before College of the City of New York

By JULIEN TAPPAN DAVIES

A corporation may be defined as a fictitious legal being, composed of one or more individuals, treated by the law as possessing many of the rights of a natural person, and some rights peculiar to itself.

The first mention in history of associations of individuals, similar to our modern corporations, is the account of the Guilds into which Numa Pompilius, King of Rome, about 700 B. C. formed the inhabitants according to their respective trades and occupations. We know little of the details of these organizations.

The laws of Solon, about B. C. 600, permitted private companies to be formed at pleasure, provided they did nothing contrary to the public law. The twelve tables of Roman jurisprudence, adopted 451 B. C., provided, in the eighth table, that societies or private companies might make their own by-laws, not being inconsistent with the public law. The Romans, however, required that every corporation should be authorized by a decree of the senate or of the emperor. Generally speaking, it may be said that we owe what may be called the corporate idea, and our fundamental views with respect to the powers, capacities and limitations of corporations, to the Roman civil law, as modified by the

jurisprudence of England. I will not trace the development of corporations from their inception to their present important part in our civilization, but will confine myself to the prominent features of their situation to-day.

The main attributes of every corporation are:

First: Its legal entity, its capacity to act within its powers and to sue and to be sued with the same freedom as that possessed by a private individual. It is said that a corporation differs from an individual in that it has no body to be kicked or soul to be damned. Nevertheless, it is subject to the blows of legislation and litigation and to be condemned to pecuniary punishment, to which its treasury—all the soul it has—must respond. A corporation is also liable to indictment and punishment for the commission of criminal offences. That punishment necessarily is confined to the exaction of fines. The individual officers and members of the corporation, however, cannot escape punishment as criminals on the plea that their crimes had been committed in a representative capacity.

The second main attribute of a corporation is its continued and unbroken ownership of its property, notwithstanding the death or resignation of its officers and members and change in membership. Like the well-known brook, men may come and men may go, but the corporation goes on forever; that is, to the extent of the period fixed originally for its corporate life at its creation, which is either perpetual or limited to specified years. This unbroken succession in the continuous life of the corporation and in the continuous ownership of its property without the necessity of the repeated conveyances required in the case of individuals when

property is transferred from one to another or it devolves by death through a will, are among the most essential and practical advantages of transacting business by the medium of corporations.

The third important attribute of corporations is the limitation of liability on the part of its members. This is the characteristic in which corporations essentially differ from partnerships. Leaving out of consideration the position of what are called "special partners" in a partnership, who, by statute and the observance of certain forms in giving notice, can limit their personal liability to respond to its debts to the amount of their respective contributions to its capital, members of a partnership, known as general partners, are under a liability for all its debts, equal not only to their payments of capital into its treasury, but also to the extent of their private fortunes. This liability is generally referred to as a liability "in solido". Members of a corporation, however, provided the corporation has been properly organized and the statutory requirements conformed to, in most cases are liable only to the extent of their contributions to its capital; that is to say, they are liable only to lose the value of their interest in the corporate property by reason of its debts or failure. Their private fortunes not invested in the corporate enterprise are free from attack on the part of the creditors of the corporation. If the corporation be of such a character that there are no contributions to the capital stock, the individual members are under no liability for the debts of the corporation whose property alone must respond to its obligations. There are important exceptions to this general statement; for instance, the statutes of this State

prescribe that stockholders of trust companies, and the statutes of the United States prescribe that stockholders of national banks shall be liable, in the event of insolvency of the corporation, to respond to creditors to an amount equal to the par value of their respective holdings of stock in addition to losing the amount of their investment. Stockholders of manufacturing corporations are jointly and severally made liable for wages of employees.

Within the range of their powers and rights, corporations are substantially in the same position as individuals with respect to making contracts, purchasing and selling property and liability for wrongs done to others, either through the negligence or intention of their officers and agents, or intentionally, providing the officers and agents are acting within the scope of their duties when doing the acts complained of. Nevertheless, a most important distinction between the position of corporations and that of individuals arises from the fact that the corporation is one of limited and not general powers, while the individual has unlimited freedom of action, subject to his responsibility to the law of the land. Hence arises the doctrine that a corporation cannot perform a valid act outside of the rights and powers granted to it. Such acts when attempted are usually spoken of as *ultra vires*. Contracts by which a corporation agrees to perform an act that is not within its chartered powers can neither be enforced against the corporation nor by the corporation against the other contracting party.

For instance, a corporation which is organized solely with the power to manufacture cannot enter

into a valid contract in the nature of insuring a building against loss by fire. It must be observed, however, that this doctrine is not allowed to be carried to the length of perpetrating either a fraud or a wrong. If an *ultra vires* contract with a corporation has been partially performed, the corporation cannot avoid the consequences of refusal of entire performance without restoring the consideration received upon the partial performance.

The question whether the acts of the officers or agents of a corporation have succeeded in binding it depends upon the fact whether the officer or agent has been duly authorized to represent the corporation. Therefore, it is that prudence requires in every instance, when one is dealing with a corporation, the ascertainment of the fact whether the agent who assumes to act for it has proper authority. In important matters it is customary to demand a copy of the by-laws, and, if necessary, a resolution of the Board of Directors before accepting the representative of the corporation as duly authorized to act for it. In the ordinary course of business, however, in matters of minor importance obviously connected with the main purpose of the corporate activities, the officers are properly assumed to have authority to represent and bind the corporation, and reliance is placed upon the well-settled proposition, that where the Board of Directors have permitted an officer or agent to hold himself out as authorized by the corporation to act along certain lines and the corporation has, on previous occasions, ratified and confirmed and received the benefits of similar acts, the corporation will not be permitted to say that the officer or agent was not duly authorized for the

reason that formal requirements have not been complied with in devolving the authority.

So much dignity was attached by the ancient common law to the use of its common seal by a corporation, that the technical rule was that the intention or the act of a corporation could not be evidenced except in writing attested by the seal. Gradually by force of decisions, as the activities of corporations in business matters became more and more numerous, and it was evident that life was not long enough to comply with the requirements of this ancient rule, corporations were permitted to act in ordinary matters without deed under seal, and finally the modern doctrine that binds a corporation to oral agreements made by its agents acting with authority either express or implied has become firmly established. A further doctrine has also been established that when the law imposes upon a corporation a duty and when a benefit has been received by a corporation at the request of its agents, an implied promise to perform certain acts, is raised in the nature of payment of a consideration and that an action will lie to enforce such promise.

Agents of corporations, however, although their agency may be proved by parol evidence, can only bind the corporation by acts and contracts done and made within the scope of their authority.

It is obvious that the identification of a corporation can only be made by the use of its corporate name, and therefore it is a general rule that a corporation can only take title to or grant property and act by the use of its corporate name. An immaterial variation in the name of the corporation does not avoid its acts; and any variation is regarded as immaterial when the true name is necessarily evident from an examination of the instrument or can be shown by proper statements. It is obvious that no corporation would be heard in an attempt to set aside its own deed or contract by reason of a misnomer in its own name. Every corporation possesses an inherent right to make rules governing the details of its management, and these are generally known as by-laws.

It is a cardinal principle in the government of corporations that the acts of a majority of the members that do not exceed the rights and powers bestowed by the charter bind the whole. Generally there is but one regular meeting of the members of the corporation held each year. This is convened upon a day of the month that is named either in the charter or the by-laws.

Special meetings of the members are usually provided for in the by-laws to be called either by officers, some of the directors, or a specified number of members upon notice of a certain number of days, with a specification of the business that is to be brought up at the special meeting. All requirements with respect to special meetings have to be strictly complied with in order that the action then taken may be binding.

A majority of the members must be present at meetings either by person or by proxy to constitute a quorum, unless the charter or by-laws otherwise provide. At common law the right to appear at a meeting of the corporation and to vote by proxy did not exist, and unless it be given in the special charter of a corporation or by a general statute, cannot be exercised. This is based upon the principle that in every case where an act is authorized

that requires the exercise of judgment the power to act cannot be delegated. We are familiar with this principle as applied to legislative bodies and to trustees in the discharge of their trusts.

Generally speaking, a corporation has power to deal freely in its by-laws with the matter of elections of officers and meetings of stockholders in conformity with the principles of the charter and in details that are not covered either by the provisions of a special act or a general statute.

Power to make by-laws is generally expressly conferred either by special charter or by general statute, but it has been held to be necessarily incident to corporate bodies.

There is no invariable rule with respect to the vesting of the power to make by-laws, and unless that power be given to the incorporators, (that is, the persons named in the charter or articles of association as those who are to start the corporation) it is conferred either upon the directors or trustees elected by the members or upon the members or stockholders themselves. Frequently the by-laws are adopted by the original members, and power of amendment is given to the representative body.

It was formerly held that in the absence of any provision, an officer of the corporation might be removed by action of the corporation for some offense that bore upon the interests of the corporation after he had had an opportunity to be heard. The same rule was applied to the member of a corporation that had no capital stock. It is usual, however, at the present time to provide in the by-laws for the appointment of officers during the pleasure of the representative board, in which event they

can be removed by the directors or trustees without any reason being assigned or any opportunity to be heard.

With respect to clubs and associations of that character, the by-laws usually provide means of removal for some specified or general offense that is injurious to the interests of the corporation after the accused party has had an opportunity to be heard; and while it has been held that such a provision does not require a formal trial at law in accordance with the rules of evidence, it does require reasonable notice and an opportunity to confront and examine witnesses who may be called.

In social clubs where expulsion means disgrace, and in other bodies where a man's professional or earning capacity is seriously affected by expulsion, this right of a fair trial in a general sense before expulsion is very important and has been the subject of a good deal of discussion in the courts. It is obvious that in case of a corporation having capital stock, the owner of shares of stock in the business could not at common law be deprived of his membership in the corporation, still less of his proprietary interest in its assets, by any form of trial or proceeding.

When it is a general principle that a corporation in addition to the powers specifically granted by the act of incorporation is held to possess those that are necessary for the purpose of carrying into effect the powers expressly granted, it is also held that the corporation possesses no powers but such as are expressly granted or necessarily implied from those that are granted.

In this particular the rule of construction applied to charters of corporations is precisely that

applied to the Constitution of the United States, which is literally a corporation of limited powers and is held to have none but those expressly granted or necessarily implied as essential to the exercise of those that are granted.

The first division to be noted between different kinds of corporations is between a corporation sole and a corporation aggregate. The corporation sole consists of but a single invidual. A corporation aggregate consists of two or more members. The corporation sole has the attributes of succession both of property and existence, and the characteristic that the private property of the individual is not liable for the debts of the corporation. In this State we have no corporation sole. In England, a bishop, dean, parson and vicar are the most numerous examples of sole corporations. The king, emperor or czar is also a corporation sole, but without the attribute, of course, of being able to be sued, except by his consent, the rule being that a sovereign, whether an individual or sovereign state, such as the United States or one of our States, cannot be sued without its consent. Most of what has been and will be said on this occasion is not applicable to corporations sole, but only to corporations aggregate.

There is one general characteristic that applies to all corporations aggregate. The corporation, having a legal existence of its own and a distinct entity, has this characteristic, that the rights of the corporation in its property, real and personal, are one kind of property, while the rights of its members or stockholders, as the case may be, in the property of the corporation are an entirely different kind of interest or

property. Therefore, it follows that as a matter of taxation, the sovereign power can impose one tax upon the corporation with respect to the property owned by it, whether that property be tangible real and personal property, or intangible property, such as credits or claims against the property of others, or rights and powers, denominated franchises, including the franchise to be a corporation; and can impose another tax upon the interest of the stockholder or member in the property of the corporation if such interest has a pecuniary value. A familiar instance of the recognition of this distinction, is the taxation, by consent of the Congress, of shareholders in National Banks by the States, while the Federal Government imposes a tax upon the income of the Banks. Another instance is the taxation by New York of her corporations with respect to property owned by them, while Massachusetts taxes the stock of those corporations in the hands of her resident citizens.

The unvarying method of organization and government of corporations aggregate is to provide, in the fundamental document, whether it be called a constitution, a charter or articles of association, for trustees or directors, according to the character of the corporation, who are generally elected by the members or stockholders, and who form the governing or legislative body, and elect executive officers who act as agents of the corporation and in accordance with the by-laws, and under the direction of the trustees or directors, exercise the corporate powers. Speaking broadly, it may be said that the transaction of all the ordinary business of the corporation is left exclusively in the hands of the representative body and the officers, while anything of an ex-

traordinary character that involves a change in the fundamental interests of the corporation, requires either the assent of the stockholders or members, or is subject to their veto. Thus, in this State, corporations generally cannot mortgage their property without the assent of a certain proportion of their members or stockholders. A business corporation cannot sell all its property, real and personal, in bulk so as to deprive itself of the means of carrying on the business for which it was incorporated, without the assent of the stockholders. The amount of capital stock of the corporation cannot be increased or diminished without the action of the stockholders. A corporation cannot either extend the term of its corporate existence, if it be organized only for a specific number of years, or cannot be dissolved without action on the part of the stockholders.

A corporation does not come into existence until its charter has been accepted by those to whom it is granted. Regarding a charter as a contract, for such it is even if the right of repeal or nullification is retained by the grantor, it cannot bind both parties until their minds have met. Hence, it follows that the Government cannot create individuals to be a corporation against their will, excepting, of course, a municipal corporation, which is a branch of the Government itself. This acceptance is not necessarily evidenced by a written instrument or a vote of acceptance on the part of the incorporators, but may be inferred from their action under the charter and their proceeding to carry into effect its provisions and exercise the powers conferred.

Having glanced thus rapidly at the general characteristics of corporations, it seems expedient now to consider the different kinds of corporations and to make our survey upon the lines laid down at present by the statutes of our State. It must be borne in mind that every corporation, being strictly a creature of the law and a creation of the governing power, must find its authority to exist, either in such a general law as that prescribed by Solon which authorized the utmost freedom in the constitution of private companies or societies so long as they did nothing that was contrary to the public interest, or by a specific grant from the governing power, generally denominated a charter. While, in the days of Rome, every corporation had to receive the approval of its charter through a decree of the Senate or the emperor, so, in later days and under the governments of modern communities, until recent years, there was no provision by general laws for the organization of corporations, but every corporation was obliged to receive from the sovereign power,—at first from the king or emperor alone, and subsequently, when representative government became effective, from the legislature with the approval of the sovereign or executive head of the government,—a grant enumerating the created rights or franchises as they are called, including the right of the individuals named to be a corporation, with specific provisions as to the method of electing its representative board, the powers of the corporation, its length of life, either perpetual or for a term of years, and the powers and liabilities or freedom from liability of its members or stockholders. Charters were occasionally granted that imposed personal liability upon all the stockholders for the debts of the corporation, while

others made them liable to an extent equal to the par value of stock held.

Some ancient corporations are said to exist by prescription—that is, no grant from the Crown, no act of a legislature can be found creating the corporation, and no charter defining its rights and powers can be produced; but as the corporation as such has exercised corporate powers from time immemorial, it is conclusively presumed that such a grant or legislative act was once in existence that conferred the powers that have been ordinarily exercised. In England corporations exist by royal grant, by Act of Parliament, general or special, and by prescription. In this country, while since the separation of the colonies from England, corporations are created only by legislative act, there are many corporations that came into existence by royal grant or Act of Parliament before our independence, and they might exist by prescription. By the first Constitution of this State, adopted in 1777, it is provided that charters granted to bodies politic and corporate by the King of Great Britain, or persons acting under his authority before October 14, 1775, shall not be affected thereby. Since that date, in this State corporations exist only by special laws or by organization under a general law upon compliance with the statutory requirements.

The famous case of Dartmouth College, in the Supreme Court of the United States, established the doctrine that its charter was a contract between the King of Great Britain and the State of New Hampshire as his successor and the corporation of the College, that could not be altered without the consent of the corporation, for in this case the King had not reserved the right of repeal or modification.

The charter of Dartmouth College was granted by Letters Patent by George III on December 13, 1769. The State of New Hampshire by statute, endeavored to change the provisions of this charter. The effect of this doctrine is avoided, however, by inserting in special acts granting charters to corporations, a provision retaining in the Legislature the right of repeal or modification, or inserting in the Constitution of the State and the statutes of the State a clause that every charter issued under either a special or general statute is subject to modification and repeal by action of the Legislature. There is therefore no corporation of this State, except those that were granted charters before the adoption of these special or general provisions, whose charter is not liable to be repealed or modified at any time by the Legislature of the State. Such action, however, would not result in confiscation or destruction of any of the property of the corporation except its franchise to be a corporation. Its rights and franchises, as well as its real and personal property, would remain in existence and could be sold or otherwise applied to the benefit of its stockholders.

Since the adoption of the Constitution of 1846, the policy of the State has been clearly defined to discourage the creation of corporations by Special Acts and to require them to be formed under general laws. A provision was placed in that Constitution which has been re-enacted in all Constitutions of the State adopted since that time, to the effect that corporations may be formed under general laws, but shall not be created by Special Act, except for municipal purposes, and in cases where in the judgment of the Legislature the objects of the corporation can not be maintained under general laws.

The body of law in this State providing general laws for the formation of corporations is now contained in what are called the Consolidated Laws of the State of New York. This legislation was adopted and passed by the Legislature in 1909, and provides for, first, a General Corporation Law which contains, as would be supposed, provisions which are generally applicable to all corporations or to all corporations of the same class. Other statutes contain provisions applicable to corporations of the class specified in the law. It must also be borne in mind that the entire body of law of the State affecting private property and criminal offences applies to corporations and is considered as forming part of their charters, except as there may be special provisions that call for the application of the doctrine of construction of statutes, that a specific enactment controls and overrides a general enactment relative to the same subject.

The General Corporation Law makes as its first classification of corporations the statement that a corporation may be either a municipal corporation, a stock corporation, or a non-stock corporation.

The statute provides that a municipal corporation includes a county, town, school district, village and city, and any other territorial division of the State established by law with powers of local government. It is not necessary to deal in detail with these various forms of municipal corporations. In all of them we discern the main and essential corporate feature of government by representation through officers, either elected by the legal voters who are members of the corporation, or appointed according to law. The essential and characteristic feature of the municipal government is that it

possesses the powers of the State by delegation for purposes of local government. In the cases of counties, towns, school districts and villages, the charters are found in general provisions of law applicable to municipal corporations of the class. Cities generally possess charters specifically providing for the method and details of local government, including local taxation and the creation of indebtedness.

The Consolidated Laws of the State, however, contain a large number of general provisions that are applicable only to cities of the State of the second class, which, as defined by the present Constitution, are all cities having a population of 50,000 and less than 175,000.

It is obvious that the statutes would necessarily have to deal separately with municipal corporations, and that provisions applicable to them would be wholly inapplicable to stock corporations or non-stock corporations, and so we find the laws arranged.

The City of New York is in a peculiar position, in that it possesses certain rights under ancient charters granted by the royal Governors Montgomery and Dongan before the Revolution, that cannot be altered or taken away by Act of the Legislature, as those charters, under the authority and doctrine of the Dartmouth College case, are contracts between the Crown of England and the City of New York, that were adopted and ratified by the first Constitution of the State of New York, and are also protected, as was the charter of Dartmouth College, by the provision of the Constitution of the United States, that no State shall pass an act impairing the obligations of a contract. New York City to-day owns, to give one instance of its inde-

structible rights of property, the franchise to establish ferries between Manhattan Island and the opposite shores of the North and East Rivers. This right it has been held is owned, not in its capacity as a municipal corporation exercising governmental powers and being a part of the government of the State, but as a corporation possessing private rights in a capacity distinct from its existence as a branch or department of the State Government.

The second general division in classification, is that of a stock corporation, which is defined as a corporation having a capital stock divided into shares and which is authorized by law to distribute to the holders thereof dividends or shares of the surplus profits of the corporation. The capital stock of a stock corporation is the money or property contributed, paid in or transferred to the corporation by individuals for the purpose of creating a stock-in-trade or a fund with which to carry on business. Those who subscribe or pay in this money or property are called stockholders or shareholders because they each own a fractional part or share of the capital stock of the corporation, in the proportions that their respective payments bear to the total amount paid in. This capital stock, for convenience, is divided into a certain number of shares, each share being for an equal amount of money; as if, for instance, $100,000. of money or property is contributed as the capital stock of a corporation, each share may be either $10., in which event there would be 10,000 shares, or each share may be $100., in which event there would be 1,000 shares. By an amendment, the statute of the State now prescribes that shares of a stock corporation may be issued to any specified

number and without any par value, provided that at least $5. a share be paid in in money or property to represent such share. It will be noticed that the statute mentions dividends or shares of surplus profits to be paid to stockholders. The law permits no payments to stockholders, except after dissolution and payment of all debts, out of the capital stock, which is regarded as a trust fund for the benefit, first, of creditors, and secondly, for the stockholders. Only profits and earnings can be the subject of dividends.

A non-stock corporation, the statute says, includes every corporation other than a stock corporation.

All three of the kinds of corporations that we are now considering, municipal corporations, stock corporations and non-stock corporations,—and it must be observed that there can be now no corporation organized under the laws of the State of New York that does not come within one of these three classes,—are spoken of as domestic corporations, for a domestic corporation is a corporation incorporated by or under the laws of the State or Colony of New York.

Every corporation which is not a domestic corporation is a foreign corporation. It is well settled that a State may or may not at its will exclude a corporation organized under the laws of some other sovereignty than its own, from doing business within its borders, except the business of interstate commerce. Every corporation of any State of the Union has a right under the Constitution of the United States to carry on the business of interstate commerce in any other State. The same rule applies to corporations of foreign gov-

ernments having treaties with the United States conferring upon the foreigners the right to trade with this country.

Notwithstanding the power of the State to refuse entrance into its borders to a foreign corporation for any purpose except the transaction of interstate commerce, when a foreign corporation has established itself within a State, either by tacit or express permission, the Fourteenth Amendment to the Constitution—by which it is provided that no State shall deny to any citizen of another State the equal protection of the laws—requires that the foreign corporation shall not be disproportionately taxed or subjected to burdens that are not equally imposed upon the corporations of the State.

The method of forming a stock or non-stock corporation is now comparatively simple under the provisions of the General Corporation Law. It is only necessary to execute and file an instrument called a certificate of incorporation. Only natural persons, and not corporations, can participate in the formation of a corporation. These natural persons must be of full age, at least two-thirds of them must be citizens of the United States, and one of them must be a resident of this State. The name of the corporation and its certificate of incorporation must be in the English language. When the certificate shall have been filed and recorded in the Office of the Secretary of State and a certified copy filed in the office of the clerk of the proper county, and all taxes and fees required to be paid in connection with the incorporation have been paid, the corporation is then empowered to exercise its corporate powers or privileges.

In the exercise of its power to exclude foreign corporations from doing business within the State, our statutes provide that foreign corporations shall

not do business within the State without paying license fees and, on compliance with certain requirements, obtaining certificates of authority from the appropriate officers. These certificates are issued by the Superintendent of Insurance, the Superintendent of Banks, and the Secretary of State, as the character of the corporation requires.

Side by side with the growth in power and usefulness of the corporations in this country during the last hundred years, has also developed, on the part of the masses of the people, a jealousy and distrust of that power, which has led to legislation oftentimes impairing usefulness, but again oftentimes properly regulating and controlling not only abuses of power, but practices that those in control of corporations have gladly seen prohibited by law. No more salutary and direct legislation in controlling the activities of corporations has found its way upon the statute books than that prohibiting the use of corporate funds for political purposes. Most States in the Union possess a law of that nature. In this State, the provision is to the effect that no corporation doing business in the State, except a corporation organized and maintained for political purposes only, shall pay or use any money or property in aid of any political party, or any corporation organized for political purposes, or in aid of any candidate for political office or nomination, or for any political purpose whatsoever. It is further provided that any officer, director, stockholder, or attorney or agent of any such corporation who violates the law, either directly or indirectly, shall be guilty of a misdemeanor, punishable by imprisonment for not more than a year and a fine of not more than one thousand dollars.

This legislation not only controls corporations from advancing their interests by political contributions, but emancipates them from any supposed necessity of protecting their interests by contributions under threats of adverse action.

Our statutes separate stock corporations into: First, monied corporations; Second, railroad or other transportation corporations; Third, business corporations.

Monied corporations are those that are formed under the Banking Law or the Insurance Law. Under the Banking Law are grouped not merely banks with powers substantially limited to discounting notes, receiving and paying out deposits, issuing bills as currency, and investing and reinvesting its assets, but also trust companies, which have assumed within the State of New York within the last thirty or forty years an importance not contemplated probably by their original projectors. Trust companies possess not merely the powers of banks, excluding, however, the right to issue bills as currency, but also functions that have only of late years been discharged by others than individuals, such as acting as trustees for estates; receiving and paying over income to life beneficiaries; acting as executors and as administrators appointed by officers having jurisdiction of the probate of wills, and acting as receivers of insolvent corporations appointed by the courts in litigations. The possession of large capitals and the continuity of succession characteristic of trust companies give them a stability and permanence when acting as trustees not possessed by an individual, whose private fortune is more liable to the vicissitudes of life, and whose death before the termination of the trust

involves the advent, and the selection, of a successor, with the necessary expensive accounting.

Savings banks can be organized under our statutes and are intended to act with security and without profit, except the payment of interest to depositors of savings in comparatively small amounts. Security is the main aim of the corporate activities and investments are more strictly regulated than those of either banks of discount or trust companies. A savings bank makes no profit for itself as a corporation. Trustees of savings banks can have no interest, direct or indirect, in the gains or profits, nor borrow money directly or indirectly, from the corporation, and can receive no compensation except when they act either as officers or a committee of examination of assets.

Co-operative loan associations, building associations, mortgage and loan companies, safe deposit companies and personal loan associations are all grouped as corporations possessing certain kinds of banking powers and are subject to the Banking Law and the supervision of the Superintendent of Banks.

The Insurance Law provides for the regulation of all corporations having powers to insure, under the superintendence of a State official known as the Superintendent of Insurance.

The first forms of insurance, historically speaking, seem to be the provisions made by the Roman legionaries in their societies for meeting the expenses of the burial or cremation of the members. Such associations do not seem to have been corporations in the sense of being legal entities, but they contained the germ of the corporation, to wit, an association of individuals who contribute for a

common object. The merchant guilds of the Middle Ages almost always contained the feature of life insurance in the provisions that were made not only for the payment of funeral expenses, but also the relief of members who had been brought to want.

No survey of the field of corporations would be complete without reference to the riotous period of the organization of corporations in England at the time of the South Sea Bubble, in the second decade of the eighteenth century, when companies were formed for every imaginable purpose, such as making flying machines, feeding hogs, manufacturing an air pump for the brain, making butter from beech trees, for perpetual motion, and for insurance against divorces.

While marine insurance in a crude form was employed in the later ages of Rome, and in the sixteenth century, the principle of marine insurance existed in Italy, the Netherlands, and Britain, the first attempt to organize a corporation for this purpose was unsuccessfully made in Holland in 1629, and it was not until about 1720 that the first corporation in Europe for the purpose of carrying on the business of marine insurance was chartered in Great Britain.

New York State permits the organization of corporations with respect to life, health and casualties, fire insurance and marine insurance, and other kinds of insurance.

Of late years a class of corporations has grown up by which titles to real estate are insured, and the credit of buyers of merchandise is guaranteed. An important feature of our system of land ownership is that the title of the owner should be carefully examined before a purchase of land is completed, and all defects in the title remedied and encumbrances by way of mortgage or lien either removed or with knowledge assumed to be paid by the purchaser. The pecuniary consequences of mistakes of conveyancers were so serious, and the inability of the examiner to respond in damages was so frequent that the idea of having titles examined by a corporation with a large capital, whose business should be so extensive that upon the principle of distribution of risks it could afford to pay occasional losses and still carry on the business profitably, began to spread in this country about forty years ago, with the result that in most of the large cities and in many of the smaller ones the greater part of the examination of titles to real estate is now carried on by corporations.

The farmer can also form a corporation under this statute to insure the lives of his domestic animals and thus distribute the chance of loss in this direction.

The practice of fire insurance, while very ancient, and found in the history of the early Saxon guilds existing at the time of the Norman Conquest, seems to have been carried on by individuals mutually insuring each other, until in the eighteenth century corporations for this purpose began to be organized in Great Britain.

The next main subdivision of stock corporations is the railroad or transportation companies, and these companies are dealt with by a separate chapter of the Consolidated Laws. In the history of corporations, we find that companies for building highways, operating lines of stage coaches and building and maintaining canals, were organized in

Great Britain and this country a hundred to two hundred years ago. With the invention of the steam locomotive and the electric railway necessarily came provisions of law permitting corporations to build and operate these means of transportation. A characteristic feature of this class of corporations is that they serve the public and their property is affected by a public use. While it is true that all corporations are considered as creatures of the state and to some extent means employed by the people at large to serve the public benefit, this is pre-eminently so in the case of transportation companies, because it is a function of government to provide highways and means of communication for the people subject to its rule. Railroads and transportation companies devote their property to a use in which the public has an interest. The result is that an interest in such use having been granted to the public, the owner of the property to the extent of that interest must submit to be controlled by the public for the common good as long as that use is maintained. This was the doctrine laid down by the Supreme Court of the United States in the case of Munn *v.* Illinois, in 94 United States Reports, when the Court ruled that the State of Illinois could regulate the charges of elevators and warehouses for grain. It is upon this principle, and it is the same principle that is applied to the regulation of charges of innkeepers, bakers and millers and others who offer to the public at large the necessities of life, that railroads and transportation companies are subjected to regulations by the Legislature, not only with regard to rates of fare, but with respect to safety appliances and many other details. It is because of the public character of these corporations that legislation usually has conferred upon them the power of eminent domain, that is, the right by appropriate legal proceedings to take, for the purposes of the corporation, any needed property upon making compensation therefor, provided such property has not already been devoted to another public use; but even in that event, the Legislature by special enactment has the power to divert any property in the State from one public use to another upon compensation being made.

At the present time in this State, legislative regulation of interstate railroads and transportation companies generally, is exercised by delegation to commissioners appointed by the Governor by and with the advice and consent of the Senate, known as Public Service Commissioners, while in matters of interstate commerce, railroad corporations are subjected to the jurisdiction of commissioners appointed by the President by and with the advice and consent of the Senate of the United States, and known as Interstate Commerce Commissioners.

Transportation corporations other than railroads receive a separate chapter in the Consolidated Laws of the State. Ferry, navigation, stage coach, tramway, gas and electric light, water works, telegraph and telephone and turnpike corporations are all included in this head, including a class of corporations known as pipe line corporations, which present a remarkable instance of the adaptation of our legislation to new discoveries and inventions. Such corporations can be formed for constructing and operating for public use, except in the City of New York, lines of pipe for conveying and transporting therein petroleum, gas, liquids, or any products or property, with the right of eminent do-

main. Certainly until the discovery in large quantities of petroleum and natural gas, pipe line companies were unknown to the world, but now they are an indispensable element in the low cost of those materials for lighting and power.

A separate chapter in the Consolidated Laws of the State is given to business corporations. The provisions of the chapter are most liberal. Three or more persons are allowed to become a stock corporation for any lawful business purpose or purposes, other than practicing law or conducting legal business by means of attorneys, or carrying on the businesses provided for by the laws relative to moneyed, insurance, railroad and educational corporations. It is under this statute that manufacturing, trading and general business can be carried on through the medium of a corporation, and the method of incorporating is simply by filing a certificate containing the details of the name of the corporation, its purposes, amount of its capital stock, the number of its shares, the amount of capital (not less than Five hundred dollars) with which it will begin business, the location of its principal office, its duration, the number of its directors, and the names and post-office addresses of its directors and subscribers to stock.

Any corporation other than a stock corporation is obviously designated by the statute to be a non-stock corporation. Apart from this general definition, which is clearly made for purposes of safety and elimination, our statutes further declare that a non-stock corporation shall be either a religious corporation or a membership corporation.

The first general act of this State for incorporating religious societies was passed on April 6th,

1784. Prior to that time, the Colonial Government had made provision for the support of ministers of the gospel, or had incorporated churches by special acts, the statute incorporating Trinity Church in the City of New York, for instance, having been passed in 1704.

The policy of the State has always been liberal toward religious corporations, except that the annual revenue that may be received from the real and personal estate of the corporation, or its value, has generally been fixed in special acts of incorporation. Under the general act, however, passed in 1909, religious corporations are empowered to acquire property for such buildings as may be necessary for their purposes and to take grants, bequests and devises of property upon trust, and to apply the income thereof to such purposes, without restriction as to the amount to be received either of principal or income; and while it is provided that a religious corporation shall not mortgage or sell any of its real property without applying for and obtaining leave of the Supreme Court, such consent is obtained without difficulty where it is made to appear that the interests of the corporation will be promoted by the mortgage or sale, and that the interests of creditors or others will not be injuriously affected.

The Consolidated Laws of the State give great freedom in the organization of clubs and associations for all manner of social, sporting, benevolent, charitable, scientific, missionary and similar purposes. In fact, it may be said generally that a corporation without capital stock may be organized under the membership corporation act for any purpose other than one in which capital is not required

to be actively employed in the transaction of its business. The amount of property that it may hold is not limited. Indeed, in order that the utmost freedom shall be given for the incorporation of these non-stock membership corporations, a provision of the statute provides a method of incorporating for any lawful purpose except a purpose for which a corporation may be created under some other provision of law.

The State, however, protects the family, by providing that no person having a husband, wife, child or parent shall by will devise or bequeath to any benevolent, charitable, literary, scientific, religious or missionary society more than one-half of his estate, after payment of debts. In the case of certain other associations, of which political clubs is a fair example, such devise or bequest is only valid to the extent of one-fourth, after payment of debts.

The liberality of our State to religious, charitable, educational and similar corporations is shown in the exemption from taxation of their personal property and so much real property as is actually used for the purposes of the corporation, real property leased and producing an income being taxable. So great an aggregate of values is thus withdrawn from the taxing power that constant efforts are being made to obtain legislation that will subject this large amount of real and personal property to taxation.

The statutes of the State favor the consolidation of corporations engaged in the same lines of business, but the consolidation of railroads having parallel or competing lines is forbidden.

Corporations are subject to be dissolved by action of the State if they exceed their corporate

powers and usurp or exercise powers which have not been granted to them. They are also liable to forfeiture of charter at the instance of the State if, having undertaken to exercise a franchise for the benefit of the public, such as a railroad or ferry franchise, they fail to perform their duties to the public. Any corporation, except a railroad or transportation corporation, that shall not organize and commence the transaction of its business or undertake the discharge of its corporate duties within two years from the date of its incorporation, incurs an absolute cessation of its corporate powers and ceases to exist, without any decree of the court to that effect.

In the case of business corporations, it is provided that one-half of the capital stock must be paid in within a year from its incorporation, or the corporation will be dissolved. That is, it may be dissolved by action of the State, but does not cease to be a corporation until a decree has been entered to that effect. Municipal and political corporations, and religious and educational corporations, are not subject to these provisions with respect to dissolution.

A corporation created by or under the laws of the State may be dissolved and all its corporate rights, privileges and franchises forfeited when it has remained insolvent for at least one year, or has neglected for at least one year to pay and discharge its notes or other evidences of debt, or has discontinued its ordinary and lawful business for at least one year; but if the corporation has banking powers, or power to make loans or pledges on deposits, or to make insurances, it may be attacked at once, when it becomes insolvent or unable to pay its

debts or has violated any provision of the statutes applicable to it. Such an action may be brought by the Attorney-General of the State, in the name of The People of the State, and if, after being called upon to move by a written statement of facts under oath, the Attorney-General omits for sixty days to begin an action for such dissolution, then a creditor or stockholder may apply to the court for leave to commence an action for dissolution, and, on obtaining leave, may maintain the action. In such a suit it is customary to grant an injunction restraining the corporation and its trustees and officers from interfering with the affairs of the corporation, and also to appoint a receiver, who shall take possession of the property, and, if necessary, carry on its business while its assets are being realized, its debts collected and its property sold.

General supervision of the corporations of the State is vested in the Supreme Court, and ample provision is made for the maintenance of actions, either by the Attorney-General or by a creditor, stockholder, trustee, director or officer, to call officers of the corporation to account for their official conduct, and compel them to restore to the corporation moneys and property which they have either acquired to themselves or lost or wasted through neglect or failure to perform their duties. The Attorney-General alone can move to suspend or remove directors and trustees from their offices and obtain the relief of a new election to fill the vacancies. The courts, in dealing with the affairs of an insolvent or dissolved corporation, proceed upon the theory that the assets of the corporation are trust funds and the directors and officers are trustees, and are liable to have applied to them

the rules that govern the conduct of trustees in their relations to their beneficiaries.

No general review of corporations would be complete without reference to the statutes that restrict their ownership of property and their power to take land by devise. At common law it was incident to every corporation that it had the capacity to purchase and alien lands and chattels unless specially restrained by its charter or by statute. This common law right of disposition continued until it was taken away as to religious corporations by several restraining statutes in the reign of Elizabeth. Kent tells us that "in England, corporations are rendered incapable of purchasing lands without the king's license; and this restriction extends equally to ecclesiastical and lay corporations, and is founded upon a succession of statutes from Magna Charta, 9 Hen. III to 9 Geo. II, which took away entirely the capacity which was vested in corporations by the common law. These statutes are known by the name of the statutes of mortmain, and they applied only to real property; and were introduced during the establishment and grandeur of the Roman church, to check the ecclesiastics from absorbing in perpetuity, in hands that never die, all the lands of the kingdom, and thereby withdrawing them from public and feudal charges."

By a later statute, 15 Richard II, civil or lay corporations were declared to be equally within the mischief and within the prohibition originally leveled at religious houses, and that statute made lands conveyed to any third person for the use of a corporation liable to forfeiture. In this country the general and special acts by which corporations

have been allowed to be formed invariably contain provisions restricting the capacity to purchase real estate to specified and necessary objects or purposes for which the corporation has been formed and in many cases, especially in those of charitable and religious corporations, sums are named in special charters as the maximum of the values of acquisitions of real and personal property. The Statute of Wills, enacted in the thirty-second year of the reign of Henry VIII, was substantially reenacted in our Revised Statutes, in the provision that no devise to a corporation should be valid unless such corporation be expressly authorized by its charter or by statute to take by devise. Doubtless, however, a foreign corporation could take by devise, purchase, hold and alien lands in the State of New York without limitation, provided its charter contained no provision that limited this right.

It is generally considered that a corporation can take a mortgage upon lands to secure loans lawfully made, and also in satisfaction of a debt validly contracted in the course of its business. It would follow that upon a sale of such land to enforce the security, a corporation might become the owner of the land with power to alien it. Some of the statutes of New York, however, provide that lands so acquired, not necessary to the business of certain corporations, such as life insurance companies, for instance, must be aliened within five years after the acquisition of the property unless the time of holding be extended by the officer having general supervision of the class of corporations to which the grantee belongs.

The history of corporations from the period of their inception shows that they have at times

brought in their train great evils while also conferring great benefits upon civilized communities. Those evils have been sought to be remedied by legislation,—most useful and important when not urged to excesses by the natural but unreasoning opposition of classes of society who have deemed themselves oppressed by corporate activities. Among the most important of these evils is an undoubted tendency, when unchecked, on the part of corporations to create monopolies, to absorb to themselves as far as possible the power to fix and regulate prices in selected lines of business and to crush out and destroy, even by unfair means, competition on the part of individuals or corporations of less capital and staying power in a trade war.

The guilds, or corporations of artisans and traders that were formed in Rome by Numa Pompilius seven hundred years before Christ, were continued in Europe throughout the Middle Ages and were most effective in creating monopolies of labor and in maintaining its price by limiting its supply.

Another evil inherent in the corporate form of action is the lack of a sense of responsibility on the part of the managers and directors. There is a certain anonymous character about the act of a corporation, no single individual feeling himself responsible for it. If an officer is criticised, he defends himself by the statement that he is merely carrying out the policy of the corporation as settled by the Board of Directors; if the Directors are attacked, the responsibility is divided among a number, and no one individual is apt to feel the same sense of wrongdoing that the conscience of an individual person would create. The higher the individual

standards of conduct however, of officers and directors, the less prominent is this evil tendency, and with the elevation of the tone of business morality, necessarily comes the stamping out of this tendency to corporate irresponsibility.

Another evil is the difficulty of detecting a course of misconduct on the part of officers or directors of a corporation until the mischief has been done, and the further difficulties that lie in the way of the members of the corporation in obtaining redress or inflicting punishment for such misdeeds. Members or stockholders whose participation in corporate action is substantially limited to reading or hearing such reports as are made to them and voting for the managing board, are comparatively helpless, by reason of their want of cohesive organization. It is perfectly true that when matters in a corporation get in a very bad way, the members or stockholders usually attempt to organize and by using their power to elect a new representative board, effect a change in the management and personnel of the officers and then undertake to obtain pecuniary redress or inflict punishment; but practically speaking, it requires a gross case to awaken the members of a corporation to action against the rulers of their choice. Much stock, for instance, in a stock corporation is usually held by widows, executors and trustees and oftentimes by infants, and by persons who are living upon their income and not associated with active business life. Capital is proverbially timid, and these classes of capitalists are more than timid and apt to be cowardly. Were members and stockholders of corporations more active and vigorous in the oversight of their own interests and more watchful and courageous with

regard to their corporate rights, there would be far less grounds for complaint than there are with respect to the negligence or worse of some of those in control of corporations.

That the benefits of the corporate idea far exceed its evils, is evident from that fact that in every civilized community much the larger part of business activities of all descriptions are carried on by means of corporations. Municipal corporations in the days of Rome and in the Middle Ages were the nurseries of freedom and the love of liberty. Such rights of local self-government as they possessed, created the taste and nurtured the love of larger freedom of civil action. To the township system of local self-government in New England has been attributed not only the Revolution of 1776, but largely the development in this country of the love of civil liberty.

The use of corporations in business life with limited liability on the part of their members, enables a man to entrust his savings to the management of others in a business for which he has no knowledge or aptitude, or even inclination, while devoting himself exclusively to the particular kind of work in which he can excel. It is the aleatory element of chance and speculation that lends zest to human effort. The progress of the world has been made by the taking of chances, and that because when chances are taken without judgment there is failure, does not disprove the proposition that the great successes in life involve taking of chances with judgment. It is in the hope of making such a success that many corporations are formed, with the willingness and ability to take chances that individuals would refuse to take, with the risk

of losing not merely the amount originally invested, but the accumulations of preceding years. The tendency of the present day in business life is to diminish the cost of production of necessary articles by the employment of huge capitals, with the results of the most expensive and ample machinery, a very large output and a small profit upon each article produced, with the finality of a large profit by reason of the amount of production. Such a kind of benefit of low prices to the community would be impossible without the employment of the corporate idea.

A further great advantage in doing business through a corporation is the benefit derived from the meetings of the boards of directors. Matters of policy are discussed by several individuals of differing points of view and varied experiences, with the result that a correct decision is arrived at more reliably and speedily than if a single individual were obliged to marshal the facts and different considerations involved without the benefit of suggestions from other independent and trained mentalities.

Our final conclusion must be that corporations, being of human agency, must necessarily be a mixture of evil and good, and that as the stream cannot rise higher than its source, we cannot expect to find in the action of a corporation a higher standard of conduct than that of the individuals who compose it.

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